

And the victims' voices?

On the ICJ's provisional measures in the Myanmar genocide case and the role of the IIMM

Konstantina Stavrou

2020-02-21T13:34:33

On January 23, the International Court of Justice (ICJ) unanimously issued its [provisional measures order](#) for the case of the Rohingya. Even though the international community has welcomed the indication of provisional measures as [a step towards accountability](#) for the heinous crimes committed against the religious minority, the importance of this order should not be overestimated.

"There were so many bodies and so much blood in the river, it looked like the river was bleeding", [said an 18-year old Rohingya woman from Buthidaung](#). Unlawful killings, sexual and gender-based violence, torture and enforced disappearances are among the crimes committed against Rohingya. More than half a century after the adoption of the first human rights instruments, it would be expected that human rights are respected and upheld universally. However, for Myanmar, this is not the case. The risk of inaction for the crimes committed against the Rohingya in 2017, led [The Gambia to initiate proceedings against Myanmar](#) concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter: the Genocide Convention). Regardless of the [outcome of the case](#), even if it was a successful one, the case before the ICJ offers only a partial solution. This post briefly elaborates on why the case before the ICJ provides only a partial solution and subsequently analyses the role of the International Investigative Mechanism for Myanmar (IIMM) concerning individual criminal responsibility.

Why the ICJ case offers only a partial solution to the genocide case

The case brought by The Gambia before the ICJ concerns Myanmar's responsibility for the failure to fulfil its statutory obligations. However, considering that the case of the Rohingya involves the alleged commission of gross human rights violations against the religious minority, individual prosecutions of those responsible are imperative for two reasons, namely the satisfaction of the victims and the identification and indictment of the individuals responsible. A case concerning State responsibility, even with a successful outcome, cannot fully satisfy any of these objectives.

Under article 34 of the ICJ Statute, only States can be parties in cases before the Court, meaning that the proceedings instituted by The Gambia are of interstate nature. Consequently, victims and their families do not have the opportunity to have their voices heard during the proceedings before the ICJ. However, in cases of serious human rights violations, [a victim-centred approach is crucial](#). Even though the crimes allegedly committed against the minority are presented by the Applicant through the findings of the Independent International Fact-Finding Mission, a victim-

centred approach to the case would require the initiation of individual criminal procedures, during which victims' participation would be ensured.

Moreover, due to the interstate nature of the proceedings, even if the Court finds Myanmar in violation of its obligations stemming from the Genocide Convention, it cannot indicate specific individuals as responsible for the crimes committed against the religious minority. This bears the risk of impunity of the perpetrators if no additional penal proceedings against individuals are instituted, either through domestic or through regional or international courts and tribunals. The Applicant has also recognised this possibility in its [application instituting proceedings](#) as the Gambia requests the Court to declare that Myanmar must ensure that persons committing genocide are punished by a competent tribunal.

The role of the IIMM

The lack of a victim-centred approach during the ICJ proceedings and the possibility of impunity of the perpetrators, despite the outcome of the ICJ proceedings, render individual criminal procedures essential for the case of the Rohingya. The role of the IIMM in this respect is central, with its aim being the collection of inculpatory and exculpatory evidence and the preparation of files to facilitate penal proceedings against individuals.

The broad documentation of the crimes from the [Independent International Fact-Finding Mission](#) and NGOs, such as the [Public International Law and Policy Group](#) and [Amnesty International](#), indicating specific individuals as responsible for the crimes, and the importance of victim participation in the proceedings concerning the grave human rights violations that took place in Myanmar have reinforced the need of individual accountability. To ensure the admissibility of the evidentiary material in competent courts and to facilitate criminal proceedings, the United Nations General Assembly (UNGA) adopted a [resolution](#) that created the IIMM. The Mechanism was established to collect inculpatory and exculpatory material which has been gathered by Civil Society Organizations (CSOs) on the ground and build strong case files to hand to domestic, regional or international courts willing and able to conduct fair and independent criminal proceedings, in accordance with international law. The importance of the IIMM and the material it collects from CSOs rests on the participation and accessibility of victims and witnesses. The engagement of victims and witnesses in the evidentiary material collected by the Mechanism, and the subsequent criminal proceedings, is critical and could lead to a more victim-centred approach. Furthermore, CSOs' collection of evidentiary material on the ground ensures the participation of key victims and witnesses, which, due to the danger of further losses of life and the susceptibility to trafficking during their stay in Bangladesh, might otherwise not be located at a later stage in order to provide a testimony. This could undermine victim participation in the penal proceedings and the outcome of the accountability process.

The IIMM demonstrates the persistence of the international community to ensure individual accountability for the crimes committed and to end impunity. Even though the prospects of immediate delivery of justice are limited, the creation of trial-ready case files by the IIMM can lay a foundation for accountability. Those files can work

as generating power for the initiation of individual criminal proceedings and can substantively assist competent jurisdictions in processing the overwhelming amount of documentation, which could otherwise require years to commence due to capacity limitations. Moreover, despite the value of CSOs and NGOs' documentation of the crimes against the minority, it lacks both the evidence regarding mens rea and modes of linkage or individual criminal liability, which could otherwise make it directly admissible to criminal courts and tribunals. The emphasis of the IIMM on the creation of criminal files that will explicitly identify these constituent elements is an innovative aspect that could ensure that the evidence collected by third actors will be used in future criminal proceedings. Through its emphasis on these integral elements, the IIMM acknowledges the role of third actors' documentation and directly links them with States' duty to investigate and prosecute. Especially in cases such as Myanmar, where international access to the sites is denied, the documentation by civil society and the creation of criminal files by the mechanism form an essential component of the duty to investigate and ensures the fulfilment of third States' obligations to investigate and prosecute.

IIMM: the road to individual criminal accountability

To conclude, despite the importance of the ICJ provisional measures as a step towards accountability, the case offers only a partial solution as it does not allow for victim participation, which is essential in cases of gross human rights violations, and it does not ensure individual accountability of those responsible. In that respect, IIMM's significance is evident: it allows for a more victim-centred approach through the utilisation of evidence collected by testimonies from victims and witnesses, it limits the exclusive dependency of investigations on action undertaken by the State where the violations occurred and ensures the sufficiency of evidentiary material for the initiation of individual penal proceedings. Documenting grave human rights violations during the crisis, creating and storing trial-ready criminal files and identifying judicial channels in third States and international courts could ensure victim participation in the proceedings as well as individual accountability of those responsible for serious human rights violations and might provide a more complete solution to the case of the Rohingya.

Konstantina Stavrou is legal and policy research trainee and holds an LL.M in Public International Law and Human Rights from Utrecht University.

Cite as: Konstantina Stavrou, "And the victims' voices? On the ICJ's provisional measures in the Myanmar genocide case and the role of the IIMM", *Völkerrechtsblog*, 21 February 2020.

